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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 182

ALLIE E. LEWIS AND WILLIAM LLOYD LEWIS, petitioners

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 900, 983) is reported in 22 F. (2d) 760. It adopts by reference its reasoning in its opinion rendered in another similar case against petitioners, *Lewis* v. *United States*, 14 F. (2d) 369.

JURISDICTION OF THIS COURT

The judgment sought to be reviewed was entered on December 5, 1927. (R. 911.) Petition for rehearing was filed and entertained, but denied on

May 7, 1928. (R. 983.) Petition for certiorari was filed in this Court on June 8, 1928.

The jurisdiction of this Court to issue the writ prayed for is conferred by the Act of February 13, 1925.

QUESTIONS PRESENTED

The petitioners were convicted in 1926 in the District Court for the Eastern District of Oklahoma, under an indictment returned there in June, 1925, of the offense of making false entries in the books of a National Bank, committed in 1923 in Tulsa County, which was in 1923 part of the then Eastern District. Between the date of the offense and the dates of the return of the indictment and of the trial, Congress detached Tulsa County and other territory from the Eastern District and placed it in the new Northern District.

The principal questions presented are whether the District Court for the Eastern District had jurisdiction, after the reorganization of the districts, to try the case, and whether the petitioners' rights under the Sixth Amendment, or under the statutes relating to such situations, were violated because no grand or petit jurymen were drawn from the detached counties.

Other questions raised are whether the minute book of the bank was a book of the bank within the meaning of section 5209 of the Revised States, and whether the evidence was sufficient to sustain the charge.

STATUTES

Section 5 of the Act of February 16, 1925 (c. 233, 43 Stat. 945), creating the Northern District of Oklahoma by withdrawing certain counties from the previously existing Eastern and Western Districts for that purpose, reads as follows:

> SEC. 5. The jurisdiction and authority of the courts and officers of the Western District of Oklahoma, and of the courts and officers of the Eastern District of Oklahoma as heretofore divided between them by the order of the senior judge of the Circuit Court of Appeals for the Eighth Circuit of the United States over the territory embraced within said Northern District of Oklahoma shall continue as heretofore until the organization of the District Court of said Northern District, and thereupon shall cease and determine, save and except in so far as the authority of the junior judge of said Eastern District is continued in him as judge of said Northern District, and save and except as to the authority expressly conferred by law on said courts, judges or officers, or any of them, to commence and proceed with the prosecution of crimes and offenses committed therein prior to the establishment of the said Northern District, and save and except as to any other authority expressly reserved to them or any of them under any law applicable in the case of the creation or change of the divisions or districts of District Courts of the United States.

The whole of the above statute is printed at pages 72 et seq. of petitioners' supporting brief.

Section 59 of the Judicial Code (U. S. C. Title 28, Sec. 121) reads as follows:

> Whenever any new district or division has been, or shall be established, or any county or territory has been or shall be transferred from one district or division to another district or division, prosecutions for crimes and offenses committed within such district, division, county, or territory prior to such transfer, shall be commenced and proceeded with the same as if such new district or division had not been created, or such county or territory had not been transferred, unless the court, upon the application of the defendant, shall order the cause to be removed to the new district or division for trial.

The Sixth Amendment provides, in part, as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, * * *.

The order of the Senior Circuit Judge, dividing the judicial work of the old Eastern District of Oklahoma among its two judges, reads as follows (R. 87-88):

> The Second Division includes the counties of Washington, Rogers, Creek and Tulsa,

> the judicial business from which is tributary to this court at Tulsa; the counties of Okfuskee, Seminole, Pontotoc, Coal and Johnston, the judicial business from which is tributary to this court at Ada; the counties of Garvin, Murray, Carter, Love, Marshall and Bryan, the judicial business from which is tributary to this court at Ardmore; and the counties of McLain, Grady, Stephens and Jefferson, the judicial business from which is tributary to this court at Chickasha.
>
> * * * * *
>
> It is further ordered that, unless and until otherwise ordered by the judge to whom the judicial work of the division in which any county is situated, the cases and issues arising in or coming from such county shall be and hereby are assigned for hearing and trial to the court town to which such county is heretofore in this order declared tributary.

Section 5209, R. S., as amended by the Act of September 26, 1918 (c. 177, 40 Stat. 967, 972; U. S. C. Title 12, Sec. 592), so far as pertinent reads as follows:

> Any officer, director, agent, * * * who makes any false entry in any book, report, or statement of such Federal reserve bank or member bank, with intent in any case to injure or defraud such Federal reserve bank or member bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such Federal reserve bank or member bank, or the Comptroller of the Currency, or any agent or

> examiner appointed to examine the affairs of such Federal reserve bank or member bank, or the Federal Reserve Board; * * * shall be deemed guilty of a misdemeanor, and upon conviction thereof in any district court of the United States shall be fined not more than $5,000 or shall be imprisoned for not more than five years, or both, in the discretion of the court.

STATEMENT

Petitioners were convicted in the United States District Court for the Eastern District of Oklahoma under an indictment charging in numerous counts various violations of section 5209 R. S., as amended, in that they made false entries in the books and reports of the Liberty National Bank, of which bank they were president and vice president, respectively. (R. 1 and 54.) They were each sentenced to serve five years' imprisonment and to pay a fine of five thousand dollars on count one. Sentences of five years each were also imposed on the remaining counts, but they were directed to run concurrently with the sentence under count one. (R. 65 et seq.)

The indictment (R. 1) charges offenses committed in 1923 at the city of Tulsa, in the County of Tulsa. At that time there were two districts in Oklahoma, the Western District and the Eastern District, and the County of Tulsa was then included in the Eastern District. The indictment was returned June 23, 1925. (R. 50.) Between the date

of the commission of the offense and the date of the return of the indictment the Act of February 16, 1925, was passed, creating the Northern District of Oklahoma, so that at the time of the return of the indictment there were three districts—the Western, the Eastern, and the Northern. The Northern District is made up of counties detached from the Eastern and Western districts. The county of Tulsa, in which this offense was committed, was detached from the Eastern District and placed in the Northern District. The reorganization of the districts became operative by the terms of section 5 of the Act of February 16, 1925, when the Northern District was organized, which occurred on April 1, 1925. (R. 85.) Tulsa had been in the Second Division of the old Eastern District. By the order of the Senior Circuit Judge of July 23, 1924, trial of criminal cases arising in the Second Division were assigned to Judge Kennamer, who was the Junior Judge of the Eastern District. By the terms of section 2 of the Act of February 16, 1925, Judge Kennamer was designated as Judge of the new Northern District, but he was assigned by the Senior Circuit Judge to the trial of this case in the Eastern District, and was disqualified by an affidavit of prejudice, and thereupon Judge Pollock, of Kansas, was assigned to the Eastern District for the trial of this case.

No change was made in the Eastern District or in the organization of the court of the Eastern District by the Act of February 16, 1925, except to de-

tach some counties, including Tulsa County, and to assign the Junior Judge of the old Eastern District to be Judge of the new Northern District. So far as the record discloses, the court of the Eastern District, after the creation of the Northern District, did not differ in its organization from the court of the Eastern District before the organization of the Northern District, except as stated by the assignment of Judge Kennamer to the Northern District, and this difference in the organization was removed in this case by the assignment of Judge Kennamer to the trial of the case. So far as appears, the Clerk and the Marshal and the court attachés and the entire organization of the District Court for the Eastern District was the same after the Act of February 16, 1925, as before.

The indictment was returned in the Eastern District after the organization of the Northern District. On April 7, 1925, after the new Northern District had been created, the list of names in the box from which the grand jurors for the Eastern District were customarily drawn, and which list had been prepared in January, was reduced by the Clerk and the Jury Commissioner by removing from the box the names of men residing in those counties detached from the Eastern District and which had been placed in the Northern District. (R. 93.) The record shows that this was done in order to provide a grand jury qualified to deal with cases arising in the Eastern District as it existed terri-

torially after April 1, 1925 (R. 94); the grand jury which returned this indictment was therefore drawn from the counties remaining in the Eastern District, and none came from the County of Tulsa.

The same situation exists respecting the petit jury which tried the case. They were drawn from a box containing names only of men residing in the counties remaining in the Eastern District after April 1, 1925.

The theory of the petitioners was that since the alleged offense had been committed before the reorganization of districts, the case should be tried and dealt with in all respects by the District Court of the old Eastern District as if the Act of February 16, 1925, had never been passed. With this as a premise, the petitioners objected to the jurisdiction of the court on the ground that the court trying them was the court for the new Eastern District and not the court for the old Eastern District. They also contended that their rights under the Sixth Amendment were violated because the petit jury was not drawn from the district in which the crime had been committed, previously ascertained by law, because no names had been drawn from the counties detached from the Eastern District, including that in which the offense had been committed. They also took exception to the constitution of the grand jury for the same reason.

To raise these points they moved to dismiss the indictment for want of jurisdiction. (R. 70.)

They moved to quash and dismiss the indictment because of want of jurisdiction of the court of the Eastern District as presently constituted and because of the alleged defect in the constitution of the grand jury. (R. 73, 76, 90.) When the case came on for trial in January, 1926, they moved to quash the petit jury panel because of the failure to include men from the counties detached from the old Eastern District, the motion being based on the claimed interpretation of Section 59 and the Sixth Amendment. (R. 128.) These motions were all denied.

The points were raised again in a motion for new trial (R. 834) and in a motion in arrest of judgment (R. 836).

The facts bearing on the alleged insufficiency of the evidence and the application of section 5209 of the Revised Statutes relating to false entries in books of a bank are substantially as stated below.

The record evidence discloses that petitioners owned more than half of the stock of the bank and were in complete control of its affairs. (R. 263, 264, 265.) There was no active board of directors, merely nominal directors whose election was procured by the defendants. (R. 237.) This nominal board held no meetings and kept no track of the affairs of the institution. The defendants obtained for their personal use several hundred thousand dollars (R. 625) of the bank's resources by procuring third parties to execute notes to the bank, the

proceeds of which notes were invariably used by the defendants. Some of these notes were good, others of dubious value and others wholly worthless. The bank became insolvent, was sold to another bank, and the stockholders of the latter bank, who had purchased without a knowledge of the true condition, were assessed approximately six hundred thousand dollars to save their own institution, as the worthless paper so acquired more than absorbed the entire capital of both banks. (R. 627.)

In order to avoid investigation of their loans by the bank examiners they had found it necessary to pretend that the indirect loans to themselves had been examined by a discount committee and approved by the board of directors. (Gov. Ex., R. 689–696.) As they had no discount committee, and no functioning board of directors, they resorted to the practice of writing up pretended minutes of purported meetings of the board, in which they recited pretended reports of a discount committee and the approval of such reports by the board. These minutes were prepared from time to time under the express direction of one of the defendants and were signed by the other defendant as president of the bank. (R. 295.) The name of the nominal secretary of the board was frequently forged thereto. (R. 295.) This course enabled the defendants to deceive (R. 225, 226) the bank examiners and the Comptroller of the Currency as to the true nature of the loans made by the bank,

a false pretense that all such loans were examined and approved by a discount committee and by the full board. The false data which was entered in the minutes was furnished the bank clerk who wrote up said minutes, by one of petitioners, and the other always joined in signing said minutes. (R. 295, 296, 686, 696.)

ARGUMENT

I

THE TRIAL TOOK PLACE IN ACCORDANCE WITH THE PROVISIONS OF THE ACT OF FEBRUARY 16, 1925, AND SECTION 59 OF THE JUDICIAL CODE, PROPERLY CONSTRUED, AND NO RIGHT OF THE PETITIONERS UNDER THE SIXTH AMENDMENT WAS INFRINGED

The proposition underlying the petitioners' contentions is that under the Act of February 16, 1925, and section 59 of the Judicial Code, since the alleged offense had been committed in the old Eastern District prior to the organization of the Northern District the trial should have been conducted by the court of the old Eastern District substantially as if the Act of February 16, 1925, had never been passed, unless, upon application of the defendants, the cause had been removed to the new district. We are in no substantial disagreement with the petitioners about this, and the District Court and the Circuit Court of Appeals for the Eighth Circuit did not disagree with the petitioners on this point.

The Circuit Court of Appeals for the Fifth Circuit, in *Quinlan* v. *United States*, 22 F. (2d) 9

(certiorari denied March 5, 1928), has reached a different conclusion as to the construction of section 59 of the Judicial Code, and has held in a case somewhat like this that the indictment should properly be returned and the case tried in the new district. While there is this conflict in the decisions, the petitioners have not contended that the Circuit Court of Appeals for the Fifth Circuit is right, nor have they based their case on any claim that the indictment should have been returned and the case tried in the new Northern District.

Petitioners' position is disclosed in their motion in arrest of judgment (R. 836), in which they seem to make it clear that they are entitled to a trial in the Eastern District as it geographically existed at the time of the commission of the offense, and to have the grand and petit jurors drawn from the whole district, and not merely from the thirty counties left in the District by the statute creating the new Northern District, *supra*. Their exact position is made even clearer by the following excerpts from the record (R. 89, 91, 138, 139):

> * * * said cause came on for hearing on motion of the defendants to dismiss the indictment because the court has no jurisdiction.
>
> Mr. Davidson. I take it that it may be conceded that on the hearing on this motion, as on the other, that the court for the Eastern [meaning Northern] District of Oklahoma was organized on the 1st day of April, 1925.

The COURT. The same admissions may be considered. You don't intend to transfer this case to the Northern District?

Mr. DAVIDSON. We haven't moved to transfer to the Northern District.

The COURT. It is not the purpose of this motion to claim your right to try the case in the Northern District?

Mr. DAVIDSON. So far as go in this motion we object to being tried in the Eastern District as it now exists.

The COURT. I want to go further with you. It isn't your purpose to claim your right to try the case in the Northern District?

Mr. DAVIDSON. No, but it is our purpose to claim our right to be tried, if anywhere, in the Old Eastern District at the time the crime was committed. We don't think the Eastern District as it now exists, or the Northern District as it now exists, has jurisdiction to try this case, but if any district has jurisdiction it is the old Eastern District in its exact condition at the time the offense was committed.

* * * * *

Mr. DAVIDSON. I would like to know, and I would like to have this go in the record, whether or not we are being put upon trial in the Eastern District of Oklahoma as it exists under this Act of February 16, 1925, or in the Eastern District of Oklahoma as it existed prior to the passage of the Act of February 16, 1925?

The COURT. Well, as I said, I don't conceive of any difference in the District Court of the Eastern District of Oklahoma prior to the passage of the act creating the Northern District, and the District Court of the Eastern District of Oklahoma subsequent to the passage of the act other than ten counties have been detached from the Eastern District, but the court as a court is the same court and the same jurisdiction and powers that it had prior to the passage of the act creating the Northern District with the exception that its territorial limits or territorial jurisdiction have been limited to the extent of the ten counties detached.

Mr. DAVIDSON. Then I would like to ask this, your honor: Are we being tried in the Eastern District in its restricted territorial jurisdiction?

The COURT. I am not passing on that question now; as to their right to a jury and where it comes from. I am simply holding this case is properly triable in the Eastern District under the Judicial Code. Now you have argued, Mr. Davidson, a question that goes to the right of selecting a jury, what kind of a jury they are to be tried before. I say I am not passing on that question at this time. I simply hold the District Court of the Eastern District has a right to try this case under the Judicial Code.

Mr. DAVIDSON. Well, we desire to except to the court's interpretation of the Act of February 16, 1925, as to the identity of the

court as it now exists and as it existed prior to the passage of that act.

* * * * *

The COURT. Let me just see; this offense is alleged to have been committed in the Eastern District of Oklahoma.

Mr. DAVIDSON. Prior to the time that the act was passed.

The COURT. So it must be tried in the Eastern District.

Mr. DAVIDSON. That is true.

The COURT. The jury must be drawn from the Eastern District.

Mr. DAVIDSON. Yes, sir.

The COURT. This is the Eastern District.

Mr. DAVIDSON. It is not the Eastern District that existed at the time this offense was committed.

The COURT. But this is the Eastern District.

Mr. DAVIDSON. In name it is, but not in territorial integrity.

The COURT. The only thing you have to complain of anything at all is that the jurors do not come from all of the counties constituting the Eastern District——

Mr. DAVIDSON. That the jury box from which it is drawn was illegally filled and is not a jury box for the old Eastern District of Oklahoma.

The COURT. Well, anyhow, the jurors that are here are probably from the Eastern District of Oklahoma.

Mr. DAVIDSON. As it now exists.

The COURT. Yes, sir.

Mr. DAVIDSON. Yes, sir.

The COURT. Do you think you are entitled to anything more?

Mr. DAVIDSON. Yes, if your honor please, we are entitled, under the Sixth Amendment to the Constitution of the United States to be tried by a fair and impartial jury.

The COURT. Yes.

Mr. DAVIDSON. Of the district as it existed at the time the offense was committed.

The COURT. Yes.

Mr. DAVIDSON. Which had been previously ascertained by law.

The COURT. Now, this is a jury from the district in which the offense is alleged to have been committed.

Mr. DAVIDSON. It is a jury for a part of that district.

So far as the construction of section 59 of the Judicial Code is concerned, we think the trial took place in exact accordance with it and with the provisions of the Act of February 16, 1925. Petitioners make an elaborate argument that the court that tried them was the court for the new Eastern District and not the court for the old Eastern District, but they fail to point out in what respect the organizations of these courts differ. In this respect petitioners' requirements would have been satisfied if the court had entitled itself "The United States District Court for the old Eastern District of Oklahoma." Petitioners do not point out wherein the court organization would have differed if they had

been tried by what they consider to be the District Court for the old Eastern District.

Under the order of the Senior Circuit Judge, in force prior to the organization of the new district, this case would normally have been tried at Tulsa, which was a court town in the Second Division where the offense was committed, but that divisional order, in its last paragraph, permitted the judge to whom the judicial work of the division was assigned to direct that a case might be tried in some other court town in the district, and section 5 of the Act of February 16, 1925, creating the new Northern District of Oklahoma, properly construed, seems to modify the divisional order as applied to trial of offenses committed before the new district was organized to the extent of allowing trial in a court town other than that in which the trial might have occurred if the new district had not been created.

So far as drawing the petit jury is concerned, petitioners were not entitled under the Sixth Amendment, or under any statute, to have the jurors drawn from every part of the original Eastern District. Congress as early as the Judiciary Act of 1789, now incorporated in section 277 of the Judicial Code, specifically authorized trial courts to draw jurors from less than the entire district. This was done not only to insure an impartial trial, but to cut down unnecessary expense, and also not to unduly burden citizens to go such distances for jury duty.

In *Ruthenberg* v. *United States*, 245 U. S. 480, 482, the Court said:

> It is contended that plaintiffs in error were not tried by a jury of the State and district in which the crime was committed, in violation of the Sixth Amendment, because the jurors were drawn not from the entire district but only from one division thereof. The proposition disregards the plain text of the Sixth Amendment, the contemporary construction placed upon it by the Judiciary Act of 1789 (c. 20, 1 Stat. 73, 88, section 29), expressly authorizing the drawing of a jury from a part of the district, and the continuous legislative and judicial practice from the beginning. Section 802, Rev. Stats.; section 277, Judicial Code. *Agnew* v. *United States*, 165 U. S. 36, 43; *United States* v. *Wan Lee*, 44 Fed. Rep. 707; *United States* v. *Ayres*, 46 Fed. Rep. 651; *United States* v. *Peuschel*, 116 Fed. Rep. 642, 646; *Clement* v. *United States*, 149 Fed. Rep. 305; *Spencer* v. *United States*, 169 Fed. Rep. 562, 565, 566; *United State* v. *Merchants' &c. Co.*, 187 Fed. Rep. 355, 359, 362.

The act of the court in drawing the jurors only from those counties remaining in the Eastern District did not in and of itself violate the Sixth Amendment or any statutory provision. It was an entirely proper thing to do, since, if grand and petit jury men had been drawn from the detached counties, there would have been two grand juries and two petit juries to deal with, one set of jurors to

consider offenses committed in the detached counties before the organization of the new district, and the other set of jurors to consider cases arising after April 1, 1925, in the territory then constituting the Eastern District. Such a confusion and resulting expense was properly avoided. There is only one point in this connection made by the petitioners which deserves consideration.

In referring to the case of *Ruthenberg* v. *United States, supra,* and other cases to the same effect, including *United States* v. *Peuschel,* 116 Fed. 642; *United States* v. *Hackett,* 29 Fed. 848; *United States* v. *Benson,* 31 Fed. 896; and *United States* v. *Standard Oil Co.,* 170 Fed. 988, the petitioners say that the decisions holding that the drawing of a jury from less than the entire district violates no right of the accused "presuppose that the court in which the prosecution is had has jurisdiction to summon jurors, both grand and petit, from any part of the district." Their argument, as we understand it, is that the provision of the Sixth Amendment is not violated if the court has power to draw jurymen from any part of the previously ascertained district in which the crime was committed, but in the exercise of its discretion, for cause, draws the jury from a part of the district, but that the constitutional provision is violated if Congress by statute attempts to prohibit the court absolutely from drawing juries in cases like this from a part of what was the district, ascertained by law, at the time of the commission of the offense.

There may be a substantial constitutional question presented if this is the proper construction of section 59 of the Judicial Code and of the Act of February 16, 1925.

There is some force in the argument that as Congress may not provide for drawing jurymen from territory not included in the district established at the time of the commencement of the offense it may not lop off territory from the previously ascertained district and prevent the drawing of jurymen from it. It is possible that a jury may be packed by act of Congress in one way as well as in the other, and to so construe the statute in the present case would deprive the court of the power to draw jurymen from the very county in which the offense was committed. If, however, there is any substantial constitutional question here, it readily may be avoided by construction of the statutes.

The Circuit Court of Appeals for the Eighth Circuit in *Lewis* v. *United States*, 14 F. (2d), 369, 371, made a statement, apparently not necessary to the decision of the case, as follows:

> If jurors from the counties transferred from the Eastern to the Northern district were to be selected, it would necessitate a writ of venire facias to the marshal for the Northern district, for the marshal of the Eastern district has no power to execute it outside of his own district. There is no statute authorizing jurors to be drawn for service out of the district of their residence.

We doubt if this statement is sound.

If necessary to avoid a serious constitutional question, the Act of February 16, 1925, creating the new Northern District of Oklahoma, and section 59 of the Judicial Code should be construed to allow the court for the Eastern District, in dealing with cases arising in the detached counties before the reorganization to summon jurors from the detached counties as well as from the counties remaining in the district and to authorize the marshal of the Eastern District to exercise the same powers within the detached counties respecting such cases as he could have exercised prior to the reorganization. Such a construction of the statutes is reasonable, and it removes any difficulty raised by the argument that the Act of Congress prohibited the drawing of jurymen from the detached counties in which the offense had been committed.

There is a conflict between the views of the Circuit Court of Appeals for the Eighth Circuit and the Circuit Court of Appeals for the Fifth Circuit respecting the construction of section 59 of the Judicial Code.

In *Quinlan* v. *United States, supra*, the Fifth Circuit held, in circumstances similar to those in the case at bar (p. 98):

> That the provision of section 59 as to prosecutions being begun and proceeded with as if the new district had not been created meant merely that jurisdiction of those cases was to be retained by the court in which they were begun, and not that the

disposition to be made of those cases was to be entirely unaffected by the creation of the new district, is quite manifest, as that section itself provides for the transfer of such cases to the court for the new district, which, of course, could not have been done if that district had not been created. As section 59 deals with the situation created by transferring part of the territory of an existing district to a newly created one, it well may be inferred that the language of the first sentence of that section, similar to that used in section 300, means that, as to criminal cases pending in the court of the old district when the new district is created, based on charges of crimes committed in the transferred territory, those cases may be proceeded with in the court in which they were instituted, the same as if the new district had not been created, though the places where the charged crimes were committed are no longer within the territorial jurisdiction of that court.

An effect of the provision is to enable the court for the old district to retain jurisdiction of pending criminal cases which properly could not be begun in that court after the creation of the new district. We conclude that that provision does not refer to cases not begun until after a new district was created, and is without effect on the power or jurisdiction of the District Court of the Middle District of Georgia with respect to criminal cases begun therein, whether the crimes charged in those cases were committed before or after the creation of that district.

As section 59 states that prosecutions for crimes committed before the new district was created shall be *commenced* and proceeded with as if the new district had not been created or the territory transferred, it seems to cover cases where prosecutions were not pending as well as where prosecutions had been commenced. The court for the Fifth Circuit deals with this by saying that an indictment is not a prosecution and returning an indictment is not commencing a prosecution, and therefore the statute relates to cases where indictments were pending in the old Southern District of Georgia before the new district was organized, but the " prosecution " had not commenced. We think the construction of section 59 adopted by the Court of Appeals for the Fifth Circuit would raise serious constitutional difficulties in throwing the trial of the case into a new district, some part of which may not have been in the old district in which the crime had been committed, and the interpretation of the statute by the Circuit Court of Appeals for the Eighth Circuit seems more reasonable, and it is a construction which the United States is prepared to support.

It would be desirable to remove this conflict by a decision of this Court. Since the petitioners did not rely on the construction of section 59 adopted by the Court of Appeals for the Fifth Circuit, it may be that the conflict can not be resolved in this case, but in a discussion of the contention of the petitioners it seems likely that this Court would

find it necessary in the course of its reasoning to adopt one or the other construction of section 59 and the other pertinent statutes, and in this way clarify the situation resulting from this conflict of decision. In the hope that some such result may follow, we are not disposed to oppose the petition for certiorari.

In the *Quinlan case* it was pointed out in the brief for the United States in this Court on the petition for certiorari that no question as to the jurisdiction of the court, or as to the constitution of the jury under the Sixth Amendment was raised by the accused until after verdict. It was also pointed out that under section 59 the accused had a right to have the cause transferred to the new district, and having consented to be tried in the new district without objection until after verdict the situation was as if the transfer had taken place. It was also pointed out that the record did not disclose from what counties the jury came, and no objection had been made in drawing the jury to the inclusion of those not residing in what had been the old district in which the offense had been committed. We account for the denial of the petition for certiorari in the *Quinlan case* by the state of the record thus disclosed.

In the present case the petitioners made timely objections of various kinds to raise their points, and although we are satisfied the decision of the court below is sound and the conviction must be sus-

tained, this Court may feel, in the exercise of its sound discretion, that the case justifies a writ of certiorari.

II

THE MINUTE BOOK IN WHICH FALSE ENTRIES WERE MADE, WAS A "BOOK" OF THE BANK WITHIN THE MEANING OF THE STATUTE VIOLATED

It appears to be the contention of the petitioners that in order to violate section 5209, R. S., as amended, *supra*, it is necessary to make false entries in a book of account of the bank, and that the minute book is not such a book.

Little needs to be added to the following excerpts from the opinion of the Circuit Court of Appeals below in disposing of the point (R. 907–908):

> The objection to the sufficiency of the evidence is twofold. First, that minute books are not books as contemplated by the statute; and, second, that the reports to the Comptroller of the Currency were not made by the defendants. We think the statute broadly covers all books, entries in which are calculated to deceive the Comptroller of the Currency and the officers of the bank. These minute books were most important under the circumstances of this case. Had they not disclosed that these loans, amounting to hundreds of thousands of dollars, had been passed on by the proper committee of the directors, those loans conceivably would have been investigated and challenged. The result

> was that the funds of the bank were misappropriated by plaintiffs in error through the instrumentality of deceptive entries in books of the bank. It is true that in a number of cases cited it has been taken for granted that the entries referred to in the statute are entries in books of account, strictly so called. Such, of course, are the usual entries that come before the courts, but no decision has either expressly, or by necessary implication, confined the application of the statute to such books of account. The word "entry," by common usage, is not so limited. Any notation in a book of the bank, calculated and intended to give information concerning matters affecting its financial integrity and the soundness of its business methods, must come within the scope of the comprehensive language employed in the statute.

The National Banking Laws do not undertake to prescribe what books a bank shall keep. The statute forbids the making of any false entry "in any book" of the bank, and there is no rule of construction, technical or otherwise, which would exclude from the reach of the statute a book of the bank in which operations of the bank were recorded, which petitioners so effectively used to cover up their nefarious transactions, and thus prevent a disclosure of the bank's real condition.

III

THE RECORD AMPLY SUPPORTS THE CHARGE THAT PETITIONERS MADE FALSE ENTRIES IN REPORTS TO THE COMPTROLLER OF THE CURRENCY

Inasmuch as the sentence imposed upon petitioners is supported by the counts of the indictment charging false entries in the minute book of the bank, it seems only necessary to quote the language used by the Circuit Court of Appeals below in disposing of the point (R. 908):

> As to the reports made to the Comptroller it is sufficiently shown that they were sent and caused to be sent by the defendants, and with their knowledge, whether by explicit direction in each case is immaterial. *Morse* v. *United States* (C. C. A. 2), 174 Fed. 539. As to the responsibility of officers having control and management see opinion of this court in *Cooper* v. *United States*, 9 Fed. (2), 216–222.

Inasmuch as petitioners were president and vice president of their bank (R. 2), they can scarcely escape criminal liability on the ground that they gave no directions to the employees of the bank to make false entries in reports to the Comptroller of the Currency. *United States* v. *Kenofsky*, 243 U. S. 440, and *Dunlop* v. *United States*, 165 U. S. 486, 497–498.

CONCLUSION

The points raised by the petitioners that the minute book is not a book of the bank within the meaning of section 5209 R. S., and as to the sufficiency

of the evidence are not substantial enough to justify the granting of the petition. In so far as the petition asks for review of the judgment on questions of jurisdiction arising because of the reorganization of the Districts, and on questions arising under the Sixth Amendment as to the constitution of the jury, the United States does not oppose the petition.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
O. R. LUHRING,
Assistant Attorney General.
HARRY S. RIDGELY,
Attorney.

JULY, 1928.

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